COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3180-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VICTORIA D. ROESING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Victoria D. Roesing appeals from a judgment of conviction after a jury found her guilty of operating a motor vehicle while under the influence of an intoxicant or other drug contrary to WIS. STAT. § 346.63(1)(a)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

(1999-2000).[2] Roesing claims that the trial court erroneously exercised its discretion when it: (1) denied the defendant's motion in limine to exclude HGN (Horizontal Gaze Nystagmus) test evidence; (2) denied the defendant's request to use the National Highway Traffic Safety Administration student manual to impeach the officer's testimony; and (3) denied the defendant's motion for a mistrial when the State told the jury that Roesing was given her ***Miranda*** rights.[3] Because the trial court did not erroneously exercise its discretion when it denied the defendant's motion in limine to exclude the HGN test, or when it denied the defendant's request to use the National Highway Traffic Safety Administration student manual to impeach the officer's testimony, or when it denied the motion for a mistrial, this court affirms.

I. BACKGROUND

¶2 On June 23, 1999, Whitefish Bay Police Officer Jay Brustmann observed Roesing driving her vehicle with its high beam lights activated. Brustmann flashed his high beam lights at Roesing to indicate that she should lower her beams, at which point he witnessed the vehicle weave such as to almost strike the right curb in the lane she was traveling and veer back across the center line. Accordingly, Brustmann stopped Roesing believing her to be an intoxicated driver.

¶3 Upon Brustmann's initial contact with Roesing, he smelled a strong odor of intoxicant so he inquired if she had been drinking; Roesing said that she

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

had not. Officer Brustmann next conducted some field sobriety tests, which Roesing failed. Subsequently, he placed Roesing under arrest for operating a motor vehicle while under the influence of an intoxicant. Later that evening at the police station, Roesing refused to submit to a blood test.

¶4 The case was tried to a jury, which found Roesing guilty. Roesing now appeals.

II. DISCUSSION

A. Denial of Motion in Limine to Exclude HGN Test Evidence.

¶5 Roesing claims that the trial court erroneously exercised its discretion when it summarily denied her motion in limine seeking to exclude the HGN evidence. She concedes that HGN evidence may be admitted in the limited circumstances where admission of the test results is accompanied by the testimony of a police officer who is properly trained to administer and evaluate the test, ***State v. Zivcic***, 229 Wis. 2d 119, 128, 598 N.W.2d 565 (Ct. App. 1999). Roesing argues, however, that the trial court denied her motion without determining whether the HGN evidence would be accompanied by the testimony of a qualified witness. Although this court agrees that a trial court should not summarily deny an HGN motion without considering whether the evidence will be accompanied by the testimony of a qualified witness, its admission here was not erroneous.

¶6 A trial court's decision to admit or exclude expert testimony is a discretionary determination that is made pursuant to WIS. STAT. RULE 901.04(1). ***Zivcic***, 229 Wis. 2d at 127. The decision will not be upset on appeal if the trial court had a reasonable basis for its decision and it was made in accordance with accepted legal standards. ***Id.***

¶7 In this case, there was sufficient evidence—at the time the evidence was admitted—to demonstrate that the arresting officer who conducted the HGN evaluation qualified as an expert. Officer Brustmann has been a patrol officer for almost ten years. He completed a fourteen-week officer recruit-training program that included specific training in HGN field sobriety tests. More specifically, the training included the use of live, intoxicated subjects. Over the course of his career, Officer Brustmann has been a part of more than seventy-five arrests for operating under the influence of an intoxicant. Given the officer's experience and training as set forth in the record, there is a reasonable basis for this court to conclude that the admission of the HGN evidence was not erroneous.

¶8 The court in ***Zivcic*** concluded that the trial court did not misuse its discretion when it allowed the arresting officer to offer expert testimony on the HGN sobriety test pursuant to WIS. STAT. § 907.02.[4] ***Id.*** at 128. Here, Officer Brustmann's specialized training and experience satisfied the requirement of ***Zivcic***—that the HGN evidence should only be admitted when accompanied by the testimony of a qualified police officer.

¶9 Accordingly, the trial court's decision to allow the HGN evidence did not constitute an erroneous exercise of discretion.

B. Denial of Request to Use National Highway Traffic Safety Administration ("NHTSA") Student Manual to Impeach the Officer's Testimony.

¶10 Roesing next claims the trial court erroneously exercised its discretion when it refused to allow her to use the NHTSA manual to impeach

[4] WIS. STAT. § 907.02 states, "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Officer Brustmann. The trial court ruled that using the manual would constitute improper impeachment. This court cannot find that this ruling constituted an erroneous exercise of discretion.

¶11 A trial court's decision to exclude evidence is a discretionary determination and will not be disturbed on appeal if it has a reasonable basis and was made in accordance with accepted legal standards. ***State v. Weber***, 174 Wis. 2d 98, 106, 496 N.W.2d 762 (Ct. App. 1993). Roesing argued that the NHTSA manual could be used because: (1) it was not hearsay because it was not offered to prove the truth of the matter asserted; (2) it constituted proper impeachment of an expert witness; and (3) it was a learned treatise.

¶12 Officer Brustmann was an HGN expert who relied on his experience and training in conducting the HGN sobriety test. He acknowledged that he received training consistent with the NHTSA manual, but did not state that he relied upon it to formulate his opinion of the defendant's performance on the test. In response to his familiarity with the NHTSA manual, Brustmann stated:

> I'm not a hundred percent sure [that Exhibit 6 was the manual used back in my training].... If this was currently, that program may have changed between now and then. I don't know if this is the same manual they're using today. I don't know if it's been updated. The last time I was trained on it was 1996. It's more of a practical based training. It's not a hundred percent out of a book.

¶13 An opponent may impeach an expert witness with a document if that expert relied on the document in formulating an opinion. ***Id.*** at 107. Here, Officer Brustmann, the expert witness, did not testify that he relied on the manual in formulating his opinion. Accordingly, there was no foundation for the assertion that he relied on the manual in administering the HGN sobriety test. Therefore,

the trial court had a reasoned and rational basis to find that the training manual was hearsay and could not be used to impeach Officer Brustmann.

¶14 In addition, Roesing's claim that the document was not hearsay because it was not being used for the truth of the matter does not persuade this court that the trial court erred. Regardless of whether the document constituted hearsay or not, it could only be admitted if it constituted proper impeachment. Here, the trial court's discretionary decision that the manual did not constitute proper impeachment was reasonable and, therefore, this court cannot reverse that ruling.

¶15 Roesing finally argues that the NHTSA manual was a learned treatise and may be received in evidence pursuant to WIS. STAT. § 908.03(18). This argument was not made to the trial court and will not be considered for the first time on appeal.

C. Motion for Mistrial.

¶16 Roesing asserts that the trial court should have granted a mistrial when the State told the jury that Roesing was given her ***Miranda*** rights. A trial court's decision to declare a mistrial is discretionary. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). Under the discretionary standard of review, this court cannot conclude that the trial court should have granted the mistrial.

¶17 In its opening statement, the State informed the jury that Roesing was read her ***Miranda*** rights by the arresting officer. The defense objected to this comment, arguing that it left the jury with the impression that she invoked the right to remain silent. It is a well-established legal principle that no constitutional

rights are violated unless reference to the post-***Miranda*** warnings is actually in evidence. ***Greer v. Miller***, 483 U.S. 756, 764-65 (1987).

¶18 The court properly instructed the jury that the remarks of the attorneys are not evidence and that if the remarks imply the existence of certain facts not in evidence, the jury should disregard any such implication and draw no inferences from the remarks. The actual evidence presented to the jury did not contain the State's reference to Roesing's post-***Miranda*** silence. Accordingly, the trial court's decision to deny Roesing's motion for a mistrial did not constitute an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.